

论我国商标法上的意思自治

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论我国商标法上的意思自治

On the Autonomy of the Will in the China's Trademark Law

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内容摘要

意思自治的理念是建立在自由这一法律价值基础之上的，从哲学上讲，任何自由都与限制而并存。因此，在由近代民法发展到现代民法的进程中，当事人绝对的自治发展到受到限制；以及商标法中意思自治受到的限制，都是意思自治理念向其本性的回归。本文从意思自治原则在商标法上的地位入手，主要运用比较分析的方法，对我国现行《商标法》上的意思自治进行探析，并基于意思自治原则，对我国《商标法》相关制度的完善，提出了自己的建议。

本文除前言和结语外，正文共四章。

第一章为意思自治原则在商标法中的地位。本章分为两节，第一节从做为私法基本原则的意思自治原则入手，分析了意思自治原则在近代民法中的绝对地位及其原因，以及意思自治原则在现代民法中受到的限制及其原因；第二节从商标法的私法属性入手，概括了意思自治在商标法中受到的限制的宏观表现并且分析了其具体原因。

第二章为商标法中意思自治原则受限制的表现。本章从论述我国商标法法律规范大多数属于公法性质的强制性规范入手，通过对比分析民法中的意思自治原则，英美法系、以及大陆法系其他国家的法律规定，得出商标法上从商标权的取得、变更、丧失、交易到商标权的救济，意思自治原则受限制的具体表现；同时，通过后者的对比分析，本文认为：我国《商标法》上的意思自治受到限制，一方面是符合世界上大多数国家的趋势；另一方面，又具有其自身的特点。这就为第四章中基于意思自治原则对我国《商标法》相关制度的完善埋下了伏笔。

第三章为商标法中意思自治原则受限制的正当性基础。从私权公权化理论、利益平衡理论和消费者保护理论入手，论证了意思自治原则受限制的正当性。就私权公权化理论来说，公权对私权的干预，是商标法自身特征的需要；就利益平衡理论来说，利益平衡在整个知识产权法中都具有举足轻重的地位，而且各国商标法的目的也是为了实现利益平衡，其表现之

一就是实现商标权人和消费者利益的平衡；就消费者保护理论来说，因为在商标法上，消费者与商标权人具有实质上的不平等性，因此为了实现对其的保护，限制强者的意思自治便具有了正当性。

第四章为扩大还是缩小自治空间：我国《商标法》相关制度的完善。本文认为，消费者利益是处理自治与国家管制这两者关系的“均点”，基于此，通过第二章中对比英美法系、大陆法系其他国家的法律规定，结合我国的司法实践，得出我国《商标法》中的一些制度还需要完善，并对其完善提出了自己的建议。

关键词：意思自治；限制；正当性

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ABSTRACT

The value of the idea of the principle of autonomy of the will is free. From the philosophical perspective, any free coexists with limit. Therefore, in the process of the development of the civil law, the party's absolute autonomy is restricted. Besides, the principle of autonomy of the will is restricted in the Trademark Law, all of which means that the idea of the principle of autonomy of the will returns to its essence. This article will start with the position that the principle of the autonomy of the will is in the Trademark Law. Mainly using the method of comparative analysis, this article analyzes the autonomy of China's current "Trademark Law". And basing on the principle of autonomy, it puts forward its own proposal on China's "Trademark Law" to perfect the related systems.

In this paper, besides the preface and conclusion, the text consists of four chapters:

Chapter one is the position of the principle of autonomy of the will in the Trademark Law. This chapter is divided into two sections, the first section starts with the principle of autonomy of the will in the private law, and analyzes the absolute position of the principle of autonomy of the will and the reason for it, and the reason for the restricted of it. The second section starts with the private attribute of the Trademark Law, summarizes the limit of the principle of autonomy of the will in the Trademark Law and analyzes the specific reasons.

Chapter two is the performances that the principle of autonomy of the will is restricted in the Trademark Law. This chapter starts with the discussion that the Trademark Law legal norms belong to the mandatory norms with strong public color. Then through the contrast analysis of the expression of the principle of autonomy in civil law, and through the contrast analysis of the legal systems in the countries of the Anglo-American and the other continental countries, this article finds the performances that the principle of autonomy of

the will is restricted, from the gain, alteration, loss, transaction to the relief of the Trademark rights. At the same time, through the latter contrast analysis, it also implies the following contents: the restriction, on the one hand, is in line with the trend of the most countries in the world, on the other hand, has the characteristics of its own, which does a hint for what it will say in the fourth chapter.

Chapter three is the basis of legitimacy of the restriction in Trademark Law. It starts with the elaboration, from the theory of public rightization of private rights, theory of balance of interests to the theory of consumer protection, and demonstrates the legitimacy that the principle of autonomy of the will is restricted. The first theory is the needs of the characteristics of the Trademark Law that the public rights intervene the private rights. On the second theory, it plays a decisive role in the intellectual property law, and the Trademark Law in the world aims to achieve the balance of interests, one of the performances is the realization of the balance of interests between the trademark owners and the consumers. On the third theory, consumers are in a weak position, compared with obligees and the other competitors in the Trademark Law. Therefore, in order to realize the aim to protect the weaker, to limit the autonomy of the will of the stronger is legitimate.

Chapter four is expanding or reducing the autonomous space: the perfection of the related systems in China's "Trademark Law". This article thinks that the point of the balance dealing with the relationship between the autonomous and the control. Based on this, through the contrast analysis of the legal provisions in the countries of the Anglo-American legal systems and the other countries of the continental legal systems in the chapter two, and according to our judicial practice, it comes to the conclusion that the related systems in China's "Trademark Law" need to be perfected. Finally, this article puts forward its own proposal on expanding or reducing the autonomous space relating to the related legal systems in China's "Trademark Law".

Key words: The Principle of Autonomy of the Will; Restriction;
Legitimacy

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